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No. 90-1592

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

MILWAUKEE COUNTY PAVERS ASSOCIATION, INC., et al.,

Petitioners,

v.

RONALD R. FIEDLER and
DAVID MANNING,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Since the fourteenth amendment permits Congress to require States, as a condition of receiving highway construction funds, to comply with rules to help the economically and socially disadvantaged and to rebuttably presume that racial minorities are so disadvantaged, may the States comply with those rules?

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STATEMENT OF THE CASE

The Surface Transportation and Uniform Relocation and Assistance Act of 1987, Pub. L. 100-17, sec. 106(c), 101 Stat. 145 (STURAA), requires states to spend "not less than 10%" of highway construction dollars on economically and socially disadvantaged business enterprises (DBEs), unless an exception is granted.[1] The federal government provides 75% of the construction dollar. App. 33, 45. A State can lose this federal money if it fails to award ten percent of the contract to the disadvantaged. App. 20. Thus, Wisconsin

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[1] Section 106(c) provides: "Except to the extent that the Secretary determines otherwise, not less than 10% of the amounts authorized to be appropriated . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."

risks about $200 million annually if it fails to comply with STURAA. App. 58, 64, 99.

The definition of "economically and socially disadvantaged" comes from the Small Business Act, 15 U.S.C. §§ 632, 637. App. 22, 71, 97. Minorities and women are presumed to be disadvantaged in the highway construction field, but the presumption is rebuttable. App. 41, 89, 99, 108-09 n. 5. Disadvantaged whites and other nonminorities are eligible, but they do not enjoy the presumption of disadvantage. Wisconsin has certified white males (App. 23, 99, 114); and it has denied certification to nondisadvantaged blacks. App. 99, 111.

STURAA is administered by the Federal Highway Administration (FHwA). It requires the States to maximize DBE opportunities. App. 20. Congress set the ten percent spending requirement as a

minimum, not a maximum. App. 78. The FHwA encourages the states to exceed the 10% minimum.[2] The FHwA, not Wisconsin, sets Wisconsin's annual goal.[3] Wisconsin hopes to adhere as closely to 10% as possible, but to not spend less. It spent 13.1% in 1987 and 1988. App. 21. The national average in 1988 was 14.9%[4] A State may seek a waiver from the ten percent requirement, but its burden is to meet specific federal criteria in order to get the waiver. See 49 C.F.R. §§ 23.64(e) and 23.69; App. 168-70, 180-84.[5] The

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[2] R. 73 at 38 (depo of Bridger); R. 72 at 35, 78, 84 (ex. 9) (depo of Mayer); R. 71 at 64-65, (depo of Manning).

[3] R. 73 at 45 (depo of Bridger); R. 72 at 33-34, 85 (depo of Mayer); 49 C.F.R. § 23.66, App. 184.

[4] R. 92.

[5] Contrary to petitioners' representation (pet. 14 n. 4), Wisconsin has sought and obtained a waiver for a goal of less than ten percent. R. 72 at 76-77, (depo of Mayer); R. 47, tr. 3/21/89 at 26.

district court found that, on individual projects, Wisconsin sets goals that are realistic in light of other considerations such as the time of the year the service is to be performed, the number of DBEs capable of performing a particular task, etc. App. 24-25.

Wisconsin has adopted the STURAA DBE program for federally funded projects. One such program is the prime set-aside program. Under it only DBE firms may bid on certain projects. This program is authorized by the federal rules, and Wisconsin has used it only on federally funded projects. App. 29, 77.

The district court found that the "integration of the federal and state programs is essentially total." App. 76. Those who are eligible are drawn from the same directory and the programs are administered together. App. 77. The presumptive inferences and other

procedures are the same. App. 111. The criteria are the same on all construction, even the former state-only funded subcontract projects.[6] On the federal projects, the district court found that Wisconsin's program is but a subsidiary of STURAA. App. 38, 66, 76-79.

The court of appeals agreed: Congress "has enlisted states as its agents to help administer a program conceded to be within the scope of section 5 [of the fourteenth amendment]." App. 8 The state is merely "the administrator and

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[6] DBE subcontract projects without federal funds have ended and they were never more than haphazard. App. 32, 35, 46. Even then, the same federal definitions and criteria were used. Pet. 11; R. 68 at 8-10 (depo of Fiedler); R. 67 at 8-9, 11-12 (depo of Bailey); R. 69 at 6, 11-12 (depo of Johnson); R. 71 at 3, 10, 11-14, 43-45, 62, 65-66, (depo of Manning); R. 14, (affidavit of Manning), paras. 5, 6, 8, 14, exs. 1, 2; R. 34, (second affidavit of Manning), para. 14; R. 26, tr. 2/21/89 at 40-42 ; R. 13, (affidavit of Thiel), paras. 8-9, 11.

disbursing agent of federal highway grants." App. 2.

Petitioners suggest it is undisputed that this is a race-based program. That is disputed. FHwA believes it is not race-based.[7] The district court found that Wisconsin in fact does not administer it as a race-based program with irrebuttable presumptions as to who is or is not disadvantaged. App. 108-09 n. 5. In practice, some blacks are excluded and some whites are included. App. 23, 99, 111, 114. The statute and FHwA rules on their face contemplate the exclusion of minorities and women who are not disadvantaged and the inclusion of nonminorities if disadvantaged. 49 C.F.R. §§ 23.62 and 23.69; App. 166-67, 173, 178-79, 190 et. seq. Although the court of appeals concluded as a matter of law that

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[7] R. 73 at 32-33 (depo of Bridger).

the presumption of disadvantage itself is a race-based classification, App. 3, respondents dispute it and petitioners cannot represent it as an undisputed fact.

Similarly, Wisconsin disputes petitioners' claim that the State's participation in the program can be called "voluntary." Wisconsin does not "elect" whether to lose $200 million each year in any meaningful sense. As stated by the district court (App. 80):

> I find unconvincing the argument that because the state can choose to give up over $200 million dollars in federal highway funding its compliance is discretionary. In Fullilove and in North Dakota v. Dole the states enjoyed the "option" of forgoing federal funds and in Fullilove the states could request a waiver of compliance. The Supreme Court did not consider these factors relevant in its determination; neither do I.

Petitioners suggest as unvarnished fact that the presumption of disadvantage can be rebutted only if the minority could

not be recognized as a minority. Pet. at 6. That is incorrect, as evidenced by the fact that blacks have been excluded even when so recognizable and disadvantaged white males can and have been found eligible. In the State's view, if the minority cannot be recognized as a minority, the only consequence is that the minority does not enjoy the presumption of economic and social disadvantage. See App. 196-98.

SUMMARY OF ARGUMENT

This petition should be denied because there is no conflict among the circuits, this Court has disposed of the question, there is no conflict with other decisions of this Court, and petitioners have conceded away their case on the merits by admitting the constitutionality of STURAA which authorizes States to participate in the federal program to help the disadvantaged, both minorities and nonminorities.

Petitioners make no pretense of suggesting there is conflict among the circuits.

This Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980) disposed of the question. It upheld local participation in a federal program to help disadvantaged minorities. It follows that STURAA is validated for doing likewise,

especially since it permits disadvantaged whites to become eligible as well.

There is no conflict between Fullilove and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Croson was solely a local program. Cronson was not a federal program administered locally. Fullilove was. Fullilove turned on the extensiveness of Congress' powers under section 5 of the fourteenth amendment. Croson did not. This Court has specifically held that Croson did not change Fullilove. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. ____, 110 S.Ct. 2997, 3009 (1990).

Petitioners have conceded away their case by admitting the constitutionality of STURAA and the administrative regulations. STURAA induces and permits State participation. Since the inducement and permission are constitutional, so is the

State response that falls within the four corners of the inducement and permission.

ARGUMENT

SINCE THE FOURTEENTH AMENDMENT PERMITS CONGRESS TO REQUIRE STATES, AS A CONDITION OF RECEIVING HIGHWAY CONSTRUCTION FUNDS, TO COMPLY WITH RULES TO HELP THE ECONOMICALLY AND SOCIALLY DISADVANTAGED AND TO REBUTTABLY PRESUME THAT RACIAL MINORITIES ARE SO DISADVANTAGED, THE STATES MAY COMPLY WITH THOSE RULES.

A. The standards for granting the petition recited.

This Court's Rule 10, as relevant here, indicates the petitioners should show a conflict among the circuits, Rule 10(a); a court of appeals decision on an important federal question which has not been, but should be, settled by this Court, Rule 10(c); or a court of appeals decision on a federal question that conflicts with applicable decisions of this Court. Rule 10(c).

B. These standards are not met.

1. There is no conflict among the circuits.

Petitioners make no representation that there is a conflict among the circuits.

2. This Court has disposed of the question presented.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), this Court upheld a federal public works program that required participating local governments to award ten percent of the contract dollars to disadvantaged minorities. Congress has done the same thing here under STURAA, with two exceptions: (1) under STURAA a contractor may get a waiver from a DBE goal if certain conditions are met, see 49 C.F.R. § 23.69, App. 173, whereas a contractor in the Fullilove program was denied the privilege even to ask for a waiver, 448 U.S. at 489; and (2) the

Fullilove program was limited to minorities, whereas under STURAA disadvantaged whites and other nonminorities are eligible. App. 23, 99, 111, 114. Both exceptions remove STURAA from the racially class-closing character of the Fullilove program.

Fullilove, therefore, clearly upholds Congress' power to enlist state aid to help disadvantaged minorities and, as in STURAA, to help disadvantaged nonminorities as well. The Seventh Circuit correctly reasoned that STURAA authorizes State participation "and action pursuant to a valid authorization is valid." App. 7. "That was Fullilove; it is this case as well." Id.

3. There is no conflict between Fullilove and Croson.

Petitioners manufacture a nonexistent conflict between Fullilove and City of Richmond v. J.A. Croson Co., 488 U.S. at 469. Fullilove and Croson, they say, must be "reconcil[ed]." Pet. 17. Croson will not permit the states to have these race-based programs absent adequate findings to warrant a remedial purpose; Fullilove upheld a race-based federal program with state and local participation but without findings by the participants. Thus, even if Fullilove permits states simply to "facially compl[y]" with the congressional enactments and the implementing federal regulations, pet. 12, petitioners say Croson does not. Petitioners even suggest this Court invited a challenge to a facial compliance with federal rules by its remand in H.K. Porter Company, Inc. v. Metropolitan Dade

County, 489 U.S. 1062 (1989), in which the eleventh circuit was instructed to consider its holding in light of Croson. Pet. 16-17.[8]

There is no conflict between Fullilove and Croson.[9] Croson struck a race-based city construction set-aside program. That was not a federal program in exercise of Congress' powers under section 5 of the fourteenth amendment. Fullilove was. The Seventh Circuit acknowledged that nothing in federal law requires States to accept the funds and participate in the program. "But [federal

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[8] As the district court observed, however, H.K. Porter dealt with the absence of any congressional authorization and the Solicitor General had recommended denial of certiorari because the statutory framework had so changed that it was unlikely the issue would recur. App. 67-68 n. 3.

[9] In district court, petitioners alleged that Croson had reversed Fullilove outright. The district court noted the clear error of the assertion. App. 67 n. 3.

law] authorizes them to do so, and action pursuant to a valid authorization is valid." App. 7. Nothing therein is contrary to Croson.

In point of fact, the Croson plurality reaffirmed Fullilove by noting that section 5 of the fourteenth amendment empowers Congress to do what State and local governments could not do. Id., 448 U.S. at 448. As correctly observed by the district court, petitioners' argument would eviscerate Congress' extensive section 5 powers. Congress could "authorize and induce" local government to participate in the program. App. 40-41 (emphasis the district court's, quoting from Fullilove at 483-84). In fact, as the Seventh Circuit noted, "To disallow the states from playing this role would merely hamstring the federal program." App. 8. Nothing in Croson encourages hamstringing the program.

This Court has repudiated petitioners' claimed conflict between Fullilove and Croson: "Croson cannot be read to undermine our decision in Fullilove." Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. at 3009. There, this Court went even further in upholding Congress' section 5 powers. It upheld congressional race-conscious programs without strict scrutiny and without the need to find victims of prior discrimination.

> We hold that benign race-conscious measures mandated by Congress -- even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. at 3008-09. This standard was met by an FCC plan to "advance the goal of"

racial diversity in programming. Id. at 3010. Using race was not an "impermissible stereotyping [because] expanded minority ... outlets will, in the aggregate, result in greater broadcast diversity." Id. at 3016.

Obviously, then, even if STURAA is race-based, expanding the pool of competitors in the lucrative highway construction industry and enhancing the business opportunities of the economically and socially disadvantaged are important governmental objectives. Using race and gender criteria as rebuttable presumptions of disadvantage itself is both an important governmental objective and also is substantially related to the objectives of increasing competition and helping the disadvantaged.

Congress' choice to have the states execute these important governmental objectives, rather than build the highways

itself, also is substantially related to achieving these objectives. The national highway program traditionally has relied on the States to implement federal objectives. Cf. 23 U.S.C. §§ 101-158. Petitioners do not lay a glove on the district judge's reasoning that "[i]f Congress can require states to comply with race-conscious requirements, state legislation enacted to create the means of fulfilling those requirements must also be permitted." App. 79.

Indeed, it is petitioners themselves who would create a conflict between sections 1 and 5 of the fourteenth amendment. Section 1 is a restraint on state power, not on Congress' power under section 5. Petitioners' conversion of the section 1 restraint to be a restraint on section 5 is an inversion of section 5. See pet. 21.

C. Petitioners have conceded away their case by admitting that STURAA is constitutionally valid.

Since the State is doing exactly what Congress wants it to do under STURAA, petitioners' concession of its constitutionality ends this case.

Petitioners say they are challenging neither STURAA nor the implementing regulations. They argue STURAA does not compel states to follow the federal law; it simply "permit[s] it." Pet. 13 (emphasis petitioners').

But by confessing the validity of the federal permission for State participation, petitioners confess the validity of State participation. The Seventh Circuit noted their fallacious argument.

> These arguments . . . are inconsistent with the contractors' decision not to challenge the validity of the federal statute or the regulations. Insofar as the

> state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.

App. 6-7. Further,

> If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.

App. 7. Further,

> Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations.

App. 9.

> [T]he contractors are quarreling with a regulation whose validity they have conceded.

App. 10.

Finally, by quarrelling with the laws whose validity they concede, petitioners cannot use Shapiro v. Thompson, 394 U.S. 618 (1969), to hold that State action must

have a validity independent of the federal backdrop. See Pet. 23. Shapiro in obiter said only that federal approval of an otherwise unconstitutional state choice could not validate the choice. 394 U.S. at 641. That approval, however, was an acquiescence, not a federal inducement of State action pursuant to section 5 of the fourteenth amendment. (Besides, Shapiro went on to say even the acquiescence would be unconstitutional.) Here, petitioners concede the independent validity of STURAA's inducement and authorization for State action. That concession validates state action taken in obedience to STURAA's terms.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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